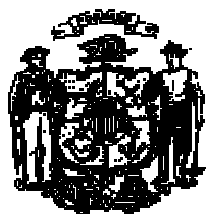


**Memorandum of Agreement**  
**between**  
**The Wisconsin Department of Natural Resources**  
**and**  
**The United States Environmental Protection Agency**  
**concerning**  
**Implementation of the Joint State/EPA Agreement to Pursue Regulatory**  
**Innovation and the Wisconsin Environmental Cooperation Pilot Program**

**The Commitment of WDNR and EPA to Work Jointly Under this Memorandum of Agreement**

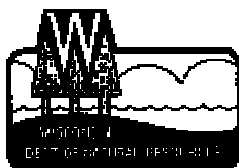
WDNR and EPA will work jointly to assure that all agency personnel are familiar with and work to implement this Memorandum of Agreement. The two agencies commit to the principles set forth and referenced herein; the roles, responsibilities, and processes described herein; and the cooperative, problem-solving spirit implicit herein. They furthermore commit to communicating, advocating, and defending the integrity of this MOA, its component parts, and pilots projects undertaken pursuant to it.

*Signed March 25, 1999:*



Handwritten signature of Scott McCallum in dark ink.

*Scott McCallum*  
Lieutenant Governor  
State of Wisconsin



Handwritten signature of George E. Meyer in dark ink.

*George E. Meyer*  
Secretary  
Wisconsin Department of Natural Resources



Handwritten signature of David A. Ulrich in dark ink.

*David A. Ulrich*  
Acting Regional Administrator  
United States Environmental Protection Agency  
Region 5

# **Memorandum of Agreement Between the Wisconsin Department of Natural Resources and the United States Environmental Protection Agency Concerning Implementation of the Joint State/EPA Agreement to Pursue Regulatory Innovation and the Wisconsin Environmental Cooperation Pilot Program - March 25, 1999**

## **I. Statement of Intent**

The United States Environmental Protection Agency Region 5 (EPA) and the Wisconsin Department of Natural Resources (WDNR) agree on the need to experiment with new approaches to improve our nation's environment. These new approaches can help us identify cleaner, cheaper, smarter ways to ensure that all Americans enjoy a clean environment and healthy ecosystems. EPA and WDNR are committed to working in an open and collaborative atmosphere to encourage, pursue, and test new ideas that work towards achieving our environmental goals and enhanced environmental performance.

This Memorandum of Agreement (MOA) is entered into by the Regional Administrator of EPA Region 5 and the Secretary of WDNR. It will guide the working partnership of both agencies in fulfilling the principles of the Joint State/EPA Agreement to Pursue Regulatory Innovation, dated March 25, 1998, and the objectives of the Wisconsin's Environmental Cooperation Pilot Program: to pilot and evaluate innovative environmental regulatory methods.

This partnership fosters an environment in which WDNR innovations are supported and encouraged in order to develop better ways of achieving environmental and ecosystem goals. As the front-line delivery agent for environmental programs, WDNR has first hand knowledge of the environmental problems, facility issues, and community concerns that puts it in a unique position to develop practical solutions that are environmentally protective as well as efficient and effective. EPA seeks to support WDNR's efforts with timely input and consultation that demonstrates openness and flexibility while observing requirements of the federal statutes.

Implementation of this agreement will be carried on in a manner consistent with WDNR's responsibilities under delegated, authorized or approved programs. When a pilot implemented under the Wisconsin Environmental Cooperation Pilot Program requires an experimental change to one of these programs, the agencies will determine what procedural requirements are necessary to effect such a change and will comply with them.

WDNR and EPA agree that the implementation of this agreement will be one of continual improvement, assessment, and adjustment. It will require on-going communication to ensure the success of the innovation projects.

This Memorandum of Agreement will remain in effect for the duration of the Wisconsin Environmental Cooperation Pilot Program. This agreement is not intended to supersede any other agreement between EPA and WDNR.

## II. Principles for WDNR/EPA Regulatory Innovations

WDNR and EPA agree to the set of basic overarching principles set forth in the Joint State/EPA Agreement to Pursue Regulatory Innovation. (This agreement can be requested from WDNR or EPA or accessed electronically at: <http://www.epa.gov/opei/innovation.htm>) The agencies shall use these principles to guide the partnership as it develops, tests, and implements regulatory innovations. These principles are:

**Experimentation:** Innovation involves change, new ideas, experimentation and some risk of failure. Experiments that will help us achieve environmental goals in better ways are worth pursuing when success is clearly defined, costs are reasonable, and environmental and public health protections are maintained.

**Environmental Performance:** Innovations must seek more efficient and/or effective ways to achieve our environmental and programmatic goals, with the objective of achieving a cleaner, healthier environment and promoting sustainable ecosystems.

**Smarter Approaches:** to reinvent environmental regulation, regulators should seek creative ways to remedy environmental problems and improve the environmental protection system, and be receptive to innovative, common sense approaches.

**Stakeholder Involvement:** Effective stakeholder involvement produces better innovation projects and catalyzes public support for new approaches. Stakeholders must have an opportunity for meaningful involvement in the design and evaluation of innovation. Stakeholders may include other state/local government agencies, the regulated community, citizen organizations, environmental groups, and individual members of the public. Stakeholder involvement should be appropriate to the type and complexity of the innovation proposal.

**Measuring and Verifying Results:** Innovations must be based on agreed-upon goals and objectives with results that can be reliably measured in order to enable regulators and stakeholders to monitor progress, analyze results, and respond appropriately.

**Accountability/Enforcement:** for innovations that can be implemented within the current regulatory framework, current systems of accountability and mechanisms of enforcement remain in place. For innovations that involve some degree of regulatory flexibility, innovators must be accountable to the public, both for regulatory requirements that replace existing regulations and for meeting commitments that go beyond compliance with current requirements. Regulators will reserve full authority to enforce alternative regulatory requirements to ensure that public health and environmental protections are maintained, and must be willing to explore new approaches to establish accountability for beyond-compliance commitments.

**State-EPA Partnership:** The State and EPA will promote innovations at all levels to increase the efficiency and effectiveness of environmental programs. We must work together in the design, testing, evaluation and implementation of innovative ideas and programs, utilizing each other's strengths to full advantage.

## III. The Wisconsin Environmental Cooperation Pilot Program

This Memorandum of Agreement defines how EPA and WDNR will work together in developing and implementing innovations under the Wisconsin Environmental Cooperation Pilot Program ("Program"). This

section of the MOA sets forth the goals of the Program. The entire text of the Wisconsin Environmental Cooperation Pilot Program statute (section 299.80, Wis. Statutes) is provided as Attachment One.

WDNR has been authorized to develop up to 10 pilot projects with companies from a variety of business sectors willing to test an alternative to the traditional command and control regulatory approach. WDNR will enter into these agreements with companies that embody a whole-facility, multi-media approach to environmental protection building off an environmental management system (EMS). One of the main goals is to establish a collaborative process involving business, government and the public in order to reach consensus that is a "win" for each. WDNR will recognize superior environmental performance by providing flexibility in certain regulatory procedures. In addition, WDNR will determine if the cooperative agreement pilot program would be effective in helping companies that are not top performers improve their performance, gain more for the environment, and provide positive lessons for similar situations elsewhere.

Under the Wisconsin Environmental Cooperation Pilot Program statute, the cooperative agreements to evaluate innovative environmental regulatory methods are required to meet the following goals:

- Provide at least the same level of protection of public health and the environment as current regulations
- Encourage systematic assessment of direct and indirect environmental impacts
- Encourage efficiency and cost-effective, verifiable pollution reduction strategies
- Encourage superior environmental performance, minimize transfers of wastes and achieve a balance among economic, social and environmental impacts
- Recognize and reward leading companies
- Encourage the transfer of information
- Consolidate permitting and approval requirements
- Grant regulatory flexibility
- Reduce government's and the facility's transaction costs for paperwork and other administrative tasks
- Encourage public participation and consensus
- Improve public information and access to performance information
- Encourage facilities to work with communities
- Increase trust amongst government, facility owners/operators and the public

These goals serve to develop a system of environmental protection that can achieve environmental goals in better ways (cleaner, cheaper, smarter) while maintaining environmental and public health protections. The Wisconsin statute is consistent with the essence of the principles set forth in the ECOS/EPA agreement.

Section 299.80(6)(a), Wisconsin Statutes, delineates that WDNR shall consult on this program with EPA.

WDNR and EPA Region 5 have signed an environmental performance partnership agreement covering the 1997-99 state fiscal years. In this agreement, Innovative Environmental Strategies is elevated as a joint priority for both WDNR and Region 5 EPA. The Cooperative Agreement Pilot Program is part of this joint priority. Work on this program will be carried over into subsequent performance partnership agreements.

#### **IV. Roles and Responsibilities of WDNR and EPA**

The Environmental Cooperation Pilot Program is a Wisconsin program. WDNR will administer and implement the Program in conjunction and coordination with its roles and responsibilities administering existing

environmental programs. It is not anticipated that EPA will be a party to cooperative agreements between WDNR and companies. However, where an agreement affects requirements of a federally delegated or authorized program, WDNR and EPA will follow the process described in Section V of this MOA to ensure that EPA is prepared to take any necessary implementing steps at the federal level.

EPA's role is to work with WDNR - when federal involvement is needed or would be helpful - in developing, implementing, monitoring, and evaluating Program innovations. When federal action is necessary for an innovation to be implemented, EPA will promptly determine what is required in order to take such action and decide whether it is prepared to take that action. This role is in addition to EPA's existing role in administering the nation's environmental programs. Each agency will emphasize early and frequent communication, cooperation, and partnership in undertaking their respective roles, both existing and specific to this new Program.

WDNR will decide which companies to accept into the Program. EPA will inform WDNR, upon reviewing a company's application, of factors it believes should be considered in the selection process, including enforcement and compliance-related matters. Based on its assessment of a company's qualifications, and in consultation with WDNR, EPA will decide whether it can take an active role in developing and putting into place the mechanisms for implementing a particular pilot.

WDNR will identify any innovations it proposes to include in a cooperative agreement with a company. WDNR and EPA then will work jointly to identify and carry out any necessary procedures for implementing the innovations in a manner consistent with state and federal law as described in Section V of this MOA.

With respect to Program pilots, WDNR and EPA will work to ensure - through effective communication and collaboration - that all enforcement decisions and actions on the part of each agency are understood by and coordinated with the other agency. WDNR and EPA understand and agree that WDNR maintains primary responsibility for monitoring compliance and taking enforcement actions under delegated, approved or authorized programs. EPA will continue to carry out its enforcement responsibilities, in accordance with the *EPA and State Regulatory Framework for EMS Pilot Projects* (see Attachment Three) agreement signed by EPA and several states on May 14, 1998; retaining the right to bring enforcement actions in appropriate circumstances, but not increasing its scrutiny of a company because of its participation in the Program.

EPA will consult with WDNR before taking any action concerning a facility operating under a cooperative agreement. WDNR will inform EPA immediately upon learning through self-disclosure from a program company of a non-compliance situation and will convey how the company proposes to address the situation. The agencies' enforcement offices will consult regarding WDNR's (and EPA's) course of action. WDNR will keep EPA informed through out the course of any compliance schedule negotiated with the company.

WDNR will take the lead in developing protocols for measuring the success of pilots with EPA and external stakeholders providing input.

## **V. The Process for Interagency Cooperation in Addressing Programmatic Issues and During WDNR Negotiation and Implementation of Agreements with Companies**

### **Overview of the Process**

WDNR and EPA will establish an Interagency Innovations Team (IIT), with a co-chair from each agency. IIT will be responsible for all interagency communication, deliberations, and coordination regarding implementation of innovations under the Program. IIT's co-chairs will report directly to the Secretary and Regional Administrator or their designees. It will have members representing each agency's key program offices.

IIT will work on two tracks. (1) It will address programmatic matters such as issues relating to: permit and delegated-program modification procedures, enforcement and compliance, and the content and implementation of this MOA. It will address these as they arise, outside the context of any specific pilot. (2) It will also serve as the forum for any interagency communication and deliberations during the selection, negotiation, and implementation of each Program pilot.

### **Programmatic Issues**

WDNR and EPA recognize that successful implementation of the Program will require agreement between the agencies on how to address a number of programmatic issues. Some such issues have been identified during the negotiation of this MOA. Others are likely to arise as implementation of the Program proceeds. IIT will be responsible for assuring that these issues are addressed by the appropriate EPA and WDNR representatives in a timely manner as they arise. Programmatic issues identified to date include:

#### **Regulatory Flexibility**

Wisconsin's Environmental Cooperation Pilot Program statute provides for waivers and modifications to regulations, policies, guidance, and practices. Such waivers and modifications will be implemented in ways that are consistent with, and do not exceed the discretion allowed under, federal and Wisconsin statutes.

When WDNR applies section 299.80 (4) or other provisions of the Wisconsin Environmental Cooperation Pilot Program statute to change or waive a requirement of state law that implements a federal program requirement (except a statutory requirement which cannot be waived or varied), the agencies will consult and assure that the change or waiver is made in accordance with all applicable procedural requirements and is fully enforceable. (See Attachment Two for a brief discussion of such federal procedures). Such a change or waiver will be effective once all procedures necessary to make it effective are completed.

#### **Assuring that WDNR/Company Agreements are Legally Binding and Enforceable**

WDNR and EPA intend that cooperative agreements be constructed in a manner that is legally binding; providing clarity and assurances to the company and enforceability to the agencies. IIT will work out specific procedures and agreement formats necessary to assure this.

EPA and WDNR acknowledge that where a cooperative agreement affects requirements under a federally authorized or delegated program, the requirements of the agreement will replace those previously in effect and will become the requirements applicable to and legally binding upon the facility after all applicable procedures necessary to effectuate such a change have been completed. In order to ensure this, where such an agreement substitutes for or modifies the terms of a permit, the agencies agree to follow the procedures applicable to permit issuance or modification under applicable state law implementing a federally delegated or approved program, or any new or modified procedure the agencies subsequently develop and agree to employ on an experimental basis that is consistent with federal and Wisconsin statutes and the ECOS/EPA Agreement. The

agencies agree that each cooperative agreement between WDNR and a company will be developed in such a way that, as described above, it constitutes a permit or permit modification that is enforceable under federal law.

Furthermore, where such an agreement affects the regulatory requirements of a federally authorized or delegated program, the agencies agree to follow the applicable federal procedures for rule or program changes - those existing as of the signing of this MOA or any new or modified procedures the agencies subsequently develop and agree to employ on an experimental basis that are consistent with federal and Wisconsin statutes and the ECOS/EPA Agreement. In this way, the agencies intend that any such change will be consistent with WDNR's responsibilities under delegated, authorized, or approved programs and federally enforceable.

#### **Developing New Procedures for Implementing Innovations on a Pilot Basis**

EPA and WDNR agree that the IIT should explore all available procedures for cost-effectively and expeditiously implementing innovations on an experimental basis in manners that are consistent with federal and Wisconsin statutes and the ECOS/EPA Agreement.

WDNR and EPA agree that any procedures they jointly develop to implement innovations will be used only in pilots where both agencies believe the experiment may lead to worthwhile systemic changes and that the company is an appropriate candidate for piloting such innovations.

#### **Enforcement Deferral and Compliance Schedules Pursuant to the Wisconsin Statute**

WDNR and EPA agree that the enforcement deferral and compliance schedule provisions of the Program, as set forth in the Wisconsin statute and discussed below, can be implemented in a manner consistent with federal and state law. This Memorandum of Agreement incorporates by reference the opinion of the Attorney General of the State of Wisconsin, dated January 25, 1999 (see Attachment Four).

The Wisconsin Environmental Cooperation Pilot Program statute calls for Program companies to perform periodic audits and to disclose to WDNR within 45 days any violation(s) they discover. Along with the disclosure of the violation, the company must describe the actions it has or will take to correct the violations and commit to correcting them within 90 days or within a compliance schedule of up to 12 months negotiated with WDNR.

As provided in the Environmental Cooperation Pilot Program, if the company complies with this provision of the statute and the violation does not present an imminent threat, nor will it cause serious harm, to public health or the environment, the statute states that WDNR may not commence a civil enforcement action to collect forfeitures for a period of 90 days. If the participant corrects the violation(s) within the 90 day time frame, WDNR may not commence a civil action to collect forfeitures for the violations. This deferral of civil enforcement does not apply to criminal actions nor to violations discovered by WDNR before a company submits its audit findings.

If the participating company cannot remedy the situation within 90 days, it can negotiate a modification to its Cooperative Agreement containing a compliance schedule of up to 12 months. Should the company not meet their obligations under such a compliance schedule, WDNR has the authority to revoke or modify the Cooperative Agreement and collect any stipulated penalties that were negotiated as part of the compliance schedule.

IIT will determine what steps, if any, need to be taken to assure these provisions of the Wisconsin statute are implemented in a manner consistent with state and federal law.

### **Public Involvement in Developing, Piloting, and Evaluating Innovations**

IIT will consult on an ongoing basis about the public involvement strategies employed in conjunction with the Program; assessing the extent to which they are consistent with the goals of the Program set forth in the Wisconsin statute and the principles set forth in the State/EPA Joint Agreement to Pursue Regulatory Innovation and evaluating strategies for improving their effectiveness.

### **IIT Process Relating to Specific Pilots**

For purposes of this MOA, the Program process for developing and implementing company pilots is divided into four phases: (1) preliminary review of company applications, (2) WDNR/company negotiations, (3) implementation of a company pilot, and (4) evaluation of lessons learned and replication of successful innovations. WDNR and EPA will work together during each of these phases as set forth below. The level of EPA involvement, and thus the level of IIT activity, will vary depending on the types of innovations proposed for a pilot and the extent to which these innovations trigger or call into question federal requirements. In some instances, EPA may have no involvement.

#### *Phase 1: Preliminary Review of Company Applications*

WDNR and EPA agree that for the overall process to proceed efficiently and successfully, the agencies need to communicate clearly during this early phase about the merits, challenges, and prospects of each potential pilot.

When WDNR receives an application from a company, it will forward a copy to the EPA IIT co-chair. Within four weeks, the EPA co-chair, will communicate by phone and in writing (email will suffice and may be preferable) to the WDNR co-chair initial reactions including an initial identification of potential issues relating to selection screening, potential alternative regulatory requirements, and possible barriers to such alternatives. Either agency may request a meeting during this phase if it believes one would be helpful in assuring clear, complete communication.

#### **Phase 2: WDNR/Company Negotiations**

WDNR and EPA agree that for pilot innovation efforts to succeed, they must proceed expeditiously through a creative negotiation/design phase. The mutually-agreed objective for this phase is to jointly develop creative approaches to environmental protection that can work from both the state and federal standpoint, within a timeframe that works for all parties involved (including the company).

The WDNR co-chair will notify the EPA co-chair by phone and in writing when WDNR decides to negotiate an agreement with a company. Along with the notification, the WDNR co-chair will convey a copy of the current draft of the proposed agreement and a description of proposed innovations it is considering incorporating into the agreement.

IIT will hold a scoping meeting if either agency believes EPA should be involved in developing any of the proposed innovations. Additional IIT meetings will be held in a timely manner as needed, with an overall



timeframe of 3 months. Who should participate in these meetings will depend on the media and types of issues involved. Each agency agrees to involve all key program offices as helpful.

WDNR will take the lead in specifically defining the purpose and parameters of any proposed innovations it is considering incorporating into a cooperative agreement. IIT will then identify potential mechanisms for implementing each innovation on a pilot basis in a manner consistent with federal and state law.

The list of the potential mechanisms IIT develops, with explanation of the pros and cons of each, will be forwarded to the Secretary of WDNR and the EPA Region 5 Administrator. The Secretary and RA, after consultation with the heads of the relevant program offices and IIT co-chairs, will provide clear direction to IIT concerning which mechanism(s) to develop and pursue. IIT will then refine the strategy.

When WDNR and a company are ready to sign an agreement, EPA will be given a final opportunity to review the agreement and, if it affects a federally delegated or authorized program, to confirm that EPA is prepared to carry out any necessary federal implementing steps. The Regional Administrator will convey this confirmation in writing to the Secretary within the three month timeframe for this phase of IIT deliberations.

### **Phase 3: Implementation of a Company Pilot**

WDNR and EPA agree to take all reasonable steps - through effective communication and collaboration - to ensure that each Program pilot proceeds smoothly through the implementation phase, with every reasonable opportunity to succeed.

IIT will assure that each agency makes a good faith effort to participate in the company's public involvement process, respond to any public inquiries or assist in other capacities. WDNR will provide EPA with a copy of each Program companies' performance evaluations. The agencies will work to develop a system for identifying Program companies in relevant databases and tracking systems so that all program offices will be aware of a company's participation in the Program. The programs also should see the pilots as opportunities to use existing data under their control and data from the projects to explore new ways to achieve greater environmental performance. IIT will convene to discuss any renewal of a cooperative agreement prior to WDNR making a final decision.

### **Phase 4: Evaluation of Lessons Learned and Replication of Successful Innovations**

WDNR and EPA agree that, as emphasized in both the Joint State/EPA Agreement to Pursue Regulatory Innovation and the Wisconsin Environmental Cooperation Pilot Program statute, evaluating pilots and the processes by which they are implemented is an integral step in making systemic improvements to environmental regulatory programs. To this end, the agencies agree to work together in evaluating the success of individual pilots, the Wisconsin Program, and the two agencies' working relationship under this MOA.

IIT will assist WDNR in conjunction with external stakeholders to develop criteria and procedures for evaluating individual pilot projects that are consistent with and build on those set forth in the Joint State/EPA Agreement to Pursue Regulatory Innovation and the Wisconsin Environmental Cooperation Pilot Program statute, as well as the statute's requirements concerning company performance evaluations. Pilot project data may be submitted to the database for performance information from environmental management systems. Those

data should be consistent with protocols developed by EPA and multi-state working group on environmental management systems.

The Wisconsin Program will be evaluated as set forth in the Joint State/EPA Agreement to Pursue Regulatory Innovation and the Wisconsin Environmental Cooperation Pilot Program statute. IIT will develop criteria for evaluating the agencies working relationship under this MOA.

**Attachments:**

Attachment One: [Section 299.80 Wisconsin Statutes - Environmental Cooperation Pilot Program](#)

Attachment Two: [Brief Discussion of Federal Procedures for Ensuring Enforceability of Agreements \(PDF, 10KB\)](#)

Attachment Three: [EPA and State Regulatory Framework for EMS Pilot Projects \(PDF, 12KB\)](#)

Attachment Four: [January 25, 1999, Attorney General's Opinion \(PDF, 10KB\)](#)